

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MICHAEL EVANS,

07-CV-1532-BR

Plaintiff,

OPINION AND ORDER

v.

MULTNOMAH COUNTY, SHERIFF  
BERNIE GUISTO, DEPUTY RICHARD  
HATHAWAY, DEPUTY ROBERT  
GRIFFITH, OFFICER RYAN  
ALBERTSON, SERGEANT CATHLINE  
GORTON, and JOHN DOES 1-3,

Defendants.

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**BROWN, Judge.**

This matter comes before the Court on the Motion (#37) for Partial Summary Judgment of Deputy Richard Hathaway and Sgt. Cathline Gorton and Plaintiff Michael Evans's Cross-Motion (#42) for Partial Summary Judgment. For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion and **DENIES** Plaintiff's Motion.

**BACKGROUND**

The following facts are undisputed unless otherwise noted:

On September 11, 2006, Plaintiff was booked into Multnomah County Detention Center (MCDC). When Plaintiff arrived for

booking, he was contacted by Deputy Hathaway and Deputy Robert Griffith, who are Deputy Sheriffs for Multnomah County. Deputies Hathaway and Griffith began to assist in the booking process. Deputy Hathaway searched Plaintiff and asked him to remove his shoes and jewelry. Deputy Griffith contends Plaintiff glared defiantly and moved slowly during the booking process. Plaintiff, however, alleges he fully complied with all of the Deputies' requests.

When Deputy Hathaway asked Plaintiff to place his fingerprints on the back of a property receipt in accordance with MCDC booking policy, Plaintiff objected because, according to Plaintiff, the list of property did not include his guns. Defendants assert Plaintiff stated, "If you want my fingerprints, you're going to have to take them." Deputy Hathaway reached for Plaintiff's hand and tried to move it toward an ink pad to begin fingerprinting. Deputy Hathaway testified in his deposition that Plaintiff tried to pull his hand away, and Deputy Hathaway tried to control Plaintiff's hand by pushing Plaintiff toward the intake counter. According to Deputy Hathaway, Plaintiff hit him in the nose during this interaction. Plaintiff, however, asserts he did not hit Deputy Hathaway at any time and was physically compliant throughout the encounter, even to the point of becoming limp at one point to show his compliance.

It is undisputed that at some point Deputies Griffith and

Hathaway grabbed Plaintiff and pulled him to the ground. Deputy Griffith testified in his deposition that he hit Plaintiff twice in the side as he was bringing Plaintiff to the ground. Deputy Hathaway testified he gave Plaintiff several "focused blows" in an effort to get him to comply with the Deputies' orders to lay on his stomach and put his hands behind him. According to Deputy Hathaway, he told Plaintiff to lay on his stomach and put his hands behind his back, but Plaintiff continued to "struggle[], f[ight], pull[] his arms in, pull[] them out, wiggle[], squirm[], kick[], twist[], roll[]". You name it." Deputy Hathaway acknowledges he administered several more focused blows to Plaintiff in an effort to get him to comply.

In addition to Deputies Hathaway and Griffith, Portland Police Officer Hager also became involved in the contact with Plaintiff and tried to secure Plaintiff's legs, but she was unsuccessful.

Ultimately, Sgt. Gorton, who was stationed at her desk away from the booking area, noticed a commotion on the television monitors at her desk. Sgt. Gorton testified in her deposition that she saw her "staff wrestling with a combative inmate on the floor." She went to the booking area and saw Deputies Hathaway and Griffith and a Portland police officer "wrestling with a guy on the floor and telling him to give them their [*sic*] hands." Sgt. Gorton testified the only statements she recalled Plaintiff

making during the struggle were "Fuck you," "I own you," and "the F word . . . frequently." Sgt. Gordon instructed Plaintiff to "stop resisting and give us his hands." According to Defendants, Sgt. Gorton directed another deputy to retrieve a taser from the charging cradle because Plaintiff continued to be noncompliant. The taser did not have the cartridge on it, and, therefore, it could not be used to shoot taser probes. Nevertheless, Sgt. Gordon took the taser over to Plaintiff, bent at the waist, and informed Plaintiff that she was going to use the taser if Plaintiff did not stop resisting. According to Defendants, Plaintiff continued to scream, curse, and yell.

Sgt. Gorton then bent down next to Plaintiff and activated the red pointer light on the taser. With her finger on the guard, Sgt. Gorton pointed the taser light at Plaintiff and briefly shined the light in his eyes so he could see the taser was activated. At that point, Defendants allege Plaintiff stopped resisting, and he was escorted to a separation cell.

That night, Deputy Hathaway prepared a Misconduct-Hearing Report in which he reported Plaintiff "struck [him] in the nose during booking. A use of force occurred in the booking area. [Plaintiff] would not follow the directions given to him during booking." The Report triggered an internal disciplinary process in MCDC that resulted in Plaintiff being subject to 20 days in "lockdown CTS" and a fee of \$5.

At some point Deputy Hathaway told Officer Hager that Plaintiff hit him in the nose with his elbow, and Officer Hager cited Plaintiff for Assaulting a Police Officer. Although Plaintiff asserts Deputy Hathaway testified as to the events of September 11, 2006, at the grand-jury proceeding in connection with the charge of Assaulting a Police Officer, Deputy Hathaway testified at deposition that he did not have any recollection of testifying before the grand jury. Ultimately the Multnomah County District Attorney dismissed this charge because Deputy Hathaway did not appear at Plaintiff's trial.

On September 12, 2007, Plaintiff filed a Complaint in Multnomah County Circuit Court against Multnomah County, Sheriff Bernie Guisto, Deputy Hathaway, Deputy Griffith, Officer Ryan Albertson, Sgt. Gorton, and John Does 1-3 in which Plaintiff alleged claims for (1) excessive force in violation of his rights under the Fourth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, (2) assault and battery under state law, (3) malicious prosecution under § 1983, and (4) failure to train and to supervise law-enforcement personnel. Plaintiff did not allege economic damages, but he sought noneconomic damages of \$60,000.

On October 12, 2007, Defendants removed the matter to this Court.

On October 1, 2008, Deputy Hathaway and Sgt. Gorton filed a Motion for Partial Summary Judgment in which Sgt. Gorton seeks

summary judgment as to Plaintiff's First and Second Claims for excessive force and assault and battery and Deputy Hathaway moves for summary judgment as to Plaintiff's Third Claim for malicious prosecution. On that same day, Plaintiff filed a Motion for Partial Summary Judgment against Sgt. Gorton, Deputy Griffith, and Deputy Hathaway as to Plaintiff's First Claim for excessive force, against Multnomah County as to Plaintiff's Second and Third Claims for assault and battery and malicious prosecution under state law, and against Deputy Hathaway as to Plaintiff's Third Claim for malicious prosecution under § 1983.

On January 30, 2009, the Court held a hearing on the parties' Motions. At the hearing, Plaintiff's counsel clarified Plaintiff's Third Claim for malicious prosecution was brought both under § 1983 and state law and Plaintiff's Fourth Claim was a *Monell*<sup>1</sup> claim against the public-body Defendant for liability as to Plaintiff's § 1983 excessive-force claims. Finally, Plaintiff's counsel confirmed all state-law claims were brought only against the public-body Defendants and all § 1983 claims were brought against the individual Defendants in their individual capacities. Because the Court found there were issues of material fact concerning the physical contact that Deputies Hathaway and Griffith had with Plaintiff during the booking process, the Court (1) denied Plaintiff's Motion for Partial

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<sup>1</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Summary Judgment as to Plaintiff's First Claim against Deputies Hathaway and Griffith for excessive force under § 1983 and (2) denied Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Second Claim for assault and battery against Multnomah County arising from the actions of Deputies Hathaway and Griffith.

The Court took the following issues under advisement:

(1) the parties' Motions for Partial Summary Judgment as to Plaintiff's First Claim against Sgt. Gorton for excessive force under § 1983, (2) the parties' Motions for Partial Summary Judgment as to Plaintiff's Second Claim against Multnomah County for assault and battery based on the actions of Sgt. Gorton, (3) the parties' Motions for Partial Summary Judgment as to Plaintiff's Third Claim against Deputy Hathaway for malicious prosecution under § 1983, and (4) the parties' Motions for Partial Summary Judgment as to Plaintiff's Third Claim against Multnomah County for malicious prosecution under state law.

#### **STANDARDS**

Federal Rule of Civil Procedure 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9<sup>th</sup>



Cir. 2005). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9<sup>th</sup> Cir. 2002)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must draw all reasonable inferences in favor of the nonmoving party. *Id.* "Summary judgment cannot be granted where contrary inferences may be drawn from the evidence as to material issues." *Easter v. Am. W. Fin.*, 381 F.3d 948, 957 (9<sup>th</sup> Cir. 2004)(citing *Sherman Oaks Med. Arts Ctr., Ltd. v. Carpenters Local Union No. 1936*, 680 F.2d 594, 598 (9<sup>th</sup> Cir. 1982)).

A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9<sup>th</sup> Cir. 1990). When the nonmoving party's claims are factually implausible, that party must "come forward with more persuasive evidence than otherwise would be necessary." *Wong v. Regents of Univ. of Cal.*, 379 F.3d 1097 (9<sup>th</sup> Cir. 2004), *as amended by* 410 F.3d 1052, 1055 (9<sup>th</sup> Cir. 2005) (citing *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1149 (9<sup>th</sup> Cir. 1998)).

The substantive law governing a claim or a defense determines whether a fact is material. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9<sup>th</sup> Cir. 2006). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Id.*

### DISCUSSION

As noted, the remaining issues in this matter are (1) the parties' Motions for Partial Summary Judgment as to Plaintiff's First Claim against Sgt. Gorton for excessive force under § 1983, (2) the parties' Motions for Partial Summary Judgment as to Plaintiff's Second Claim against Multnomah County for assault and battery as to the actions of Sgt. Gorton, (3) the parties' Motions for Partial Summary Judgment as to Plaintiff's Third Claim against Deputy Hathaway for malicious prosecution under § 1983, and (4) the parties' Motions for Partial Summary Judgment as to Plaintiff's Third Claim against Multnomah County for malicious prosecution under state law.

#### **I. Plaintiff's First Claim against Sgt. Gorton for excessive force under § 1983.**

Plaintiff contends Sgt. Gorton used excessive force when she shined the red pointer light of the taser in Plaintiff's eyes and threatened to tase him. Defendants assert Sgt. Gorton did not use excessive force, and, in any event, she is entitled to

qualified immunity as to this claim.

**A. Excessive force under § 1983.**

In his Complaint, Plaintiff brings his excessive-force claim pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. In their Motion for Summary Judgment, Defendants contend the Court should apply the Fourth Amendment standard to Plaintiff's claims of excessive force pursuant to *Pierce v. Multnomah County*, 76 F.3d 1032, 1036 (9<sup>th</sup> Cir. 1996), and *Lolli v. County of Orange*, 351 F.3d 410, 412 (9<sup>th</sup> Cir. 2003). In his Cross-Motion for Summary Judgment, Plaintiff applied the Fourth Amendment test laid out in *Graham* to his claims of excessive force.

The law that applies to claims of excessive force that arise during the booking process is unsettled. In *Graham v. Connor*, the Supreme Court held the Fourth Amendment rather than the Due Process Clause of the Fourteenth Amendment sets the standard to apply in the context of an excessive-force claim that arises during an arrest or investigatory stop:

all claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing

these claims.

490 U.S. 386, 394 (1989)(emphasis in original). Although the Court specifically declined to resolve "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive . . . force beyond the point at which arrest ends and pretrial detention begins" the Court noted "[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force [and] [a]fter conviction, the Eighth Amendment 'serves as the primary source of substantive protection.'" *Id.* at 395 n.10.

In *Pierce*, the plaintiff was arrested, booked, and awaiting identification in a holding cell when officers allegedly used excessive force against her. 76 F.3d at 1036. The Ninth Circuit concluded the district court erred when it applied an Eighth Amendment standard to evaluate the plaintiff's excessive-force claims. *Id.* at 1042. After noting the Supreme Court left unresolved in *Graham* the constitutional standard to apply to individuals alleging excessive force after arrest and before detention, the Ninth Circuit held in *Pierce* that

the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest.

*Id.*

In *Gibson v. County of Washoe*, the decedent was

arrested, booked, and died while in pretrial detention. 290 F.3d 1175, 1182-83 (9<sup>th</sup> Cir. 2002). In addition to due-process claims that jailers were deliberately indifferent to decedent's medical needs, his Estate also brought § 1983 excessive-force claims concerning the force used against the decedent while in pretrial custody. After acknowledging the Supreme Court's language in *Graham* that "[t]he Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment," the Ninth Circuit explained:

Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, *id.*, we have determined that the Fourth Amendment sets the "applicable constitutional limitations" for considering claims of excessive force during pretrial detention. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996). *Graham* therefore explicates the standards applicable to a pretrial detention excessive force claim in this circuit.

*Id.* at 1197. The court then applied the Fourth Amendment standard set out in *Graham* to the plaintiff's excessive-force claim. *Id.*

In *Lolli*, the plaintiff was arrested on an outstanding warrant, booked, and placed in a holding cell where he alleged the defendants subjected him to excessive force. 351 F.3d at 412. The Ninth Circuit again noted "'the Fourth Amendment sets the applicable constitutional limitations for considering claims of excessive force during pretrial detention.'" *Id.* (quoting

*Gibson*, 290 F.3d at 1197)). Although the court did not reference *Graham*, the court "evaluate[d] [the plaintiff's] claim under [the Fourth] [A]mendment's objective reasonableness standard." *Id.* (citing *Pierce*, 76 F.3d at 1043)).

Here Plaintiff's excessive-force claim arises from actions occurring after his warrantless arrest, during the booking process, and before a Magistrate determined there was probable cause for the initial arrest. Consistent with the Ninth Circuit's decisions in *Pierce* and *Gibson*, the Court applies the Fourth Amendment standard to Plaintiff's § 1983 claims for excessive force.

Under *Graham* the pertinent question when assessing an excessive-force claim under the Fourth Amendment is whether the force used "was objectively reasonable 'in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.'" *Gregory v. County of Maui*, 523 F.3d 1103, 1106 (9<sup>th</sup> Cir. 2008)(quoting *Graham*, 490 U.S. at 397). Determining the "reasonableness" of a particular action "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* (internal quotation marks omitted).

To determine the reasonableness of the use of force, the court first must evaluate "the type and amount of force

inflicted." *Miller v. Clark County*, 340 F.3d 959, 964 (9<sup>th</sup> Cir. 2003)(citation omitted).

Second, [the Court must] assess the importance of the government interests at stake by evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. See *Graham*, 490 U.S. at 396 (internal quotations omitted). Third, [the Court must] balance the gravity of the intrusion on the individual against the government's need for that intrusion to determine whether it was constitutionally reasonable. See *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1199 (9<sup>th</sup> Cir. 2000)(judgment vacated and case remanded for further consideration in light of *Saucier v. Katz*, 533 U.S. 194 (2001), by *County of Humboldt v. Headwaters Forest Defense*, 534 U.S. 801 (2001)) (judgment reaffirmed after remand by *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1127 (9<sup>th</sup> Cir. 2002)).

*Id.* See also 490 U.S. at 396 (listing factors). The Ninth Circuit has also recognized

not all of the *Graham* factors are relevant when the alleged excessive force occurs during an altercation with a pretrial detainee. See *Gibson*, 290 F.3d at 1197 & n.21; see also *Lolli v. County of Orange*, 351 F.3d 410, 415-16 & n.4 (9<sup>th</sup> Cir. 2003).

*Cotton v. County of Santa Barbara*, No. 06-56079, 286 Fed. Appx. 402, 406 (9<sup>th</sup> Cir. July 22, 2008).

In *Gibson*, the Ninth Circuit noted "[i]n the context of pretrial detention rather than arrest, it is clear that all the factors mentioned in *Graham* - whether the suspect is resisting arrest or attempting to flee, for example - will not necessarily

be relevant." 290 F.3d at 1197 n.21. See also *Lolli*, 351 F.3d at 415-16 (same). In *Cotton*, the Ninth Circuit noted

[i]t is also clear that the *Graham* factors do not adequately take into consideration the governmental interests at stake when resistance occurs in a custodial setting. The Supreme Court has recognized that "prison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the 'obligation to take reasonable measures to guarantee the safety of the inmates themselves.'" *Whitley v. Albers*, 475 U.S. 312, 320 (1986) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

The ultimate question "in all cases is whether the use of force was 'objectively reasonable in light of the facts and circumstances confronting' the . . . officers." *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9<sup>th</sup> Cir. 2007) (quoting *Graham*, 490 U.S. at 397).

#### **B. Qualified immunity.**

Defendants contend Sgt. Gorton is entitled to qualified immunity because the law was not so clearly established that Sgt. Gorton was on fair notice that her threat to use the taser in the circumstances of the encounter at issue would violate Plaintiff's right to be free from excessive force under the Fourth Amendment.

"Generally officers performing discretionary duties have qualified immunity, which shields them 'from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have



violated.'" *Haynie v. County of Los Angeles*, 339 F.3d 1071, 1077 (9<sup>th</sup> Cir. 2003)(quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). "Qualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

In *Saucier v. Katz*, the Supreme Court held a court that is evaluating a defense of qualified immunity must first "determine whether--resolving all disputes of fact and credibility in favor of the party asserting the injury--the facts adduced at summary judgment show that the officer's conduct violated a constitutional right" before the court determined "whether, at the time of the violation, the constitutional right was 'clearly established.'" 533 U.S. 194, 201 (2001).

In 2009, however, the Supreme Court, held

while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

*Pearson v. Callahan*, 129 S. Ct. 808, 812 (2009).

In the present circumstances, this Court concludes it is appropriate to reach the merits of Sgt. Gorton's qualified immunity defense without resolving whether Plaintiff's

allegations, if true, establish a constitutional violation. Thus, the Court considers whether at the time of Sgt. Gorton's actions there was any clearly established prohibition from threatening to use a taser in the manner Plaintiff alleges.

A right is clearly established if its "contours" are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Even if the violated right is clearly established . . . in certain situations, it may be difficult for a police officer to determine how to apply the relevant legal doctrine to the particular circumstances he or she faces. [T]herefore, . . . if an officer makes a mistake in applying the relevant legal doctrine, he or she is not precluded from claiming qualified immunity so long as the mistake is reasonable. That is, if the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.

*Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060-61 (9<sup>th</sup> Cir. 2006)(quotations omitted).

"Because the focus is on whether the officer had fair notice that [his] conduct was unlawful, . . . [i]f the law at [the time of the conduct] did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability." *Brosseau*, 125 S. Ct. at 599.

The "clearly established" requirement "operates 'to ensure that before they are subjected to suit, [government officials] are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)(quoting *Saucier*, 533 U.S. at 206). For a constitutional right to be clearly established, "its contours 'must be sufficiently clear that a reasonable official would understand that what he

is doing violates that right'" at the time of his conduct. *Id.* (citations omitted)(quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). If a plaintiff's constitutional rights were not clearly established at the time of the violation, then qualified immunity should be granted.

*Eng v. Cooley*, 552 F.3d 1062, 1075 (9<sup>th</sup> Cir. 2009).

Plaintiff did not cite any cases in which courts have concluded the threat to use a taser constitutes excessive force, which suggests Plaintiff's right to be free from excessive force in the form of a threat to use a taser is not and was not at the time clearly established. Plaintiff argues a reasonable officer would equate the threat to use a taser to the threat to use a firearm and, therefore, under the evidence viewed in Plaintiff's favor, a reasonable officer would have had fair notice that the threat to use a taser would constitute excessive force. At least one court, however, has concluded even the actual use of a taser is an intermediate level of force; *i.e.*, less force rather than equivalent to an officer's the use of a firearm. *See Sanders v. City of Fresno*, 551 F. Supp. 2d 1149, 1170 (E.D. Cal. 2008)("use of the Taser is a medium or intermediate level of force" that is less than a strike from a solid baton). Thus by analogy, a reasonable officer would not have had fair notice that the threat to use a taser is equivalent to the threat to use a firearm and might constitute excessive force in the circumstances Plaintiff alleges.

On this record, the Court concludes no reasonable

officer would have had fair notice that a threat to tase a pretrial detainee in these circumstances amounted to constitutionally excessive force in violation of Plaintiff's rights. Thus, Sgt. Gorton is entitled to qualified immunity as to Plaintiff's First Claim for excessive force under § 1983.

Accordingly, the Court grants Defendant's Motion for Partial Summary Judgment as to Plaintiff's First Claim against Sgt. Gorton for excessive force on the basis of qualified immunity and denies Plaintiff's Cross-Motion for Partial Summary Judgment as to this claim against Sgt. Gorton.

## **II. Plaintiff's Second Claim against Multnomah County for assault and battery.**

Plaintiff brings his Second Claim against Multnomah County based on the actions of Sgt. Gorton when she allegedly committed assault and battery against Plaintiff by threatening to tase him.<sup>2</sup> Plaintiff and Sgt. Gorton both move for summary judgment on this claim.

### **A. Standards.**

Under Oregon law, civil assault occurs when (1) a person commits an act intending to cause a harmful or offensive

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<sup>2</sup> Although Plaintiff brought this claim against Sgt. Gorton in his Complaint, Plaintiff conceded at oral argument that he could only bring this claim against Multnomah County pursuant to the Oregon Tort Claims Act (OTCA). The parties, therefore, agreed to interpret Plaintiff's Second Claim as proceeding against Multnomah County and to treat the parties' respective Motions for Partial Summary Judgment as brought by and against Multnomah County.

contact with the person of another or to cause a belief by the other person that a harmful or offensive contact may immediately occur and (2) the other person reasonably believes such contact is likely to occur immediately. *See generally Mays v. Huling Buick Co.*, 246 Or. 203, 204 (1967). Oregon courts have defined "battery" as an intentional tort that "is a 'voluntary act that is intended to cause the resulting harmful or offensive contact.'" *Ballard v. City of Albany*, 221 Or. App. 630, 640-41 (2008)(quoting *Walthers v. Gossett*, 148 Or. App. 548, 552, (1997)). The Oregon Court of Appeals has held when the "physical violence exerted by the officers against [the] plaintiff was no more than necessary to accomplish the legitimate purpose of fulfilling their duty," the force was reasonable and the officers did not commit assault or battery. *Gigler v. City of Klamath Falls*, 21 Or. App. 753, 763 (1975).

#### **B. Battery analysis.**

As noted, Sgt. Gorton was aware the taser was not equipped with a cartridge at the time she pointed the taser light at Plaintiff and, therefore, she knew she was unable to tase Plaintiff. Thus, the undisputed facts demonstrate Sgt. Gorton did not intend any harmful or offensive contact resulting from her threat to use the taser. The Court, therefore, concludes as a matter of law that Sgt. Gorton's threat to use the taser was not a battery under Oregon law.

Accordingly, the Court grants Defendants' Motion for Partial Summary Judgment and denies Plaintiff's Motion for Partial Summary Judgment as to the battery portion of Plaintiff's Second Claim.

**C. Assault analysis.**

At oral argument, Defendant Multnomah County conceded for the purposes of its Motion that Sgt. Gorton assaulted Plaintiff under Oregon law when she threatened to tase Plaintiff because she intended to cause Plaintiff to believe a harmful or offensive contact would occur immediately, and, in fact, Plaintiff reasonably believed the harmful contact was likely to occur immediately. Multnomah County, however, asserts Sgt. Gorton's actions were privileged under Oregon Revised Statute § 161.205(2) and under *Gigler*. In response, Plaintiff contends § 161.205 applies only in the criminal context and does not provide a defense in the civil context. To support its assertion that § 161.205 is applicable in the context of a civil action, Multnomah County relies on *Hatfield v. Gracen*, 279 Or. 303 (1977), and *Gigler*.

Section 161.205(2) provides in pertinent part:

The use of physical force upon another person that would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

\* \* \*

(2) An authorized official of a jail, prison

or correctional facility may use physical force when and to the extent that the official reasonably believes it necessary to maintain order and discipline or as is authorized by law.

In *Hatfield*, the trial court relied on § 161.205(5) when formulating a civil jury instruction. On appeal, the Oregon Supreme Court noted

[t]he instruction is taken from ORS 161.205(5). However, this statute deals only with criminal liability, and it is not directly applicable to cases involving civil tort liability. As a general rule, the existence of a statutory defense to a criminal prosecution does not necessarily mean that civil liability can be avoided as well, but no exception to this instruction was taken on these grounds.

*Id.* at 307-08. The Oregon Supreme Court, therefore, did not explicitly rule on whether § 161.205 is ever applicable to a civil matter.

In *Gigler*, the Oregon Court of Appeals cited Oregon Revised Statutes §§ 161.235 and 161.245 in support of a defense against the civil liability of an officer who uses force when making an arrest or preventing an escape. 21 Or. App. at 763. Unlike § 161.205, however, §§ 161.235 and 161.245 are not limited on their face to criminal prosecutions. *Gigler*, therefore, is distinguishable from *Hatfield*.

As the court noted in *Hatfield*, under Oregon law the existence of a statutory defense to a criminal prosecution does not generally establish a defense to civil liability. Indeed,

Multnomah County has not cited any cases in which an Oregon court has applied the defense in § 161.205 to a civil claim for assault. Based on *Hatfield*, therefore, the Court concludes § 161.205 does not provide a defense to a civil-assault claim.

When the "physical violence exerted by the officers against [the] plaintiff was no more than necessary to accomplish the legitimate purpose of fulfilling their duty," Oregon courts have concluded the force was reasonable and the officers did not commit assault. *Gigler*, 21 Or. App. at 763. Here, however, the parties dispute whether Plaintiff failed to comply with the Deputies' commands at the time Sgt. Gorton threatened to tase him. As noted, Sgt. Gorton testified Plaintiff continued to struggle, but Plaintiff testified he was totally compliant. The Court, therefore, concludes a genuine issue of material fact exists as to the core facts from which a jury will determine whether Sgt. Gorton used reasonable force when she threatened to tase Plaintiff.

Accordingly, the Court denies both parties' Motions for Partial Summary Judgment as to the assault portion of Plaintiff's Second Claim.

**III. Plaintiff's Third Claim against Deputy Hathaway for malicious prosecution under § 1983.**

Plaintiff alleges Deputy Hathaway initiated the criminal charge of Assaulting a Police Officer against Plaintiff with malice or without probable cause to "unjustly deprive [Plaintiff]



of liberty."

Defendants move for summary judgment as to Plaintiff's malicious-prosecution claims on the grounds that (1) a § 1983 claim is not available because "process is available within the state judicial systems to remedy such wrongs" and (2) there is not any evidence that Deputy Hathaway acted with malice or without probable cause.

**A. Malicious prosecution standards under § 1983.**

In *Freeman v. City of Santa Ana*, the Ninth Circuit explained malicious prosecution within the context of § 1983 as follows:

Malicious prosecution, by itself, does not constitute a due process violation; to prevail [the plaintiff] must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right. *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9<sup>th</sup> Cir. 1985)(*en banc*); *Cline v. Brusett*, 661 F.2d 108, 112 (9<sup>th</sup> Cir. 1981).

68 F.3d 1180, 1189 (9<sup>th</sup> Cir. 1995). In *Freeman*, the court concluded the plaintiff had not met her burden as to her malicious-prosecution claim because

[a]lthough she alleges that the defendants acted with intent to deprive her of constitutional rights, [the plaintiff] is unable to show that she was prosecuted without probable cause. [The plaintiff] merely lists the series of citations that were issued against her and notes that they were dismissed. However, the mere fact a prosecution was unsuccessful does not mean it was not supported by probable cause. She does not point to any evidence indicating that probable

cause was lacking.

*Id.* (citations omitted).

"Malicious prosecution actions are not limited to suits against prosecutors but may be brought, as here, against other persons who have wrongfully caused the charges to be filed." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9<sup>th</sup> Cir. 2004) (citing *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126-27 (9<sup>th</sup> Cir. 2002)).

Nevertheless, police officers are not generally "liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." *Blankenhorn v. City of Orange*, 485 F.3d 463, 482 (9<sup>th</sup> Cir. 2007). "This presumption may be rebutted by showing, for example, that the prosecutor was pressured or caused by the investigating officers to act contrary to his independent judgment or that the investigating officers presented the prosecution with information known by them to be false." *Id.* (internal quotation omitted). For example, when the prosecutor relied solely on the police reports and the reports themselves contained "striking omissions" and "conflicting accounts of the incident," the Ninth Circuit held the jury could reasonably conclude the officers "procured the filing of the criminal complaint by making misrepresentations to the prosecuting attorney." *Borunda v. Richmond*, 885 F.2d

1384, 1390 (9<sup>th</sup> Cir. 1988). Similarly, when the prosecutor had only the police report from which to make the charging decision, the police omitted crucial information, and an independent witness provided corroboration for the plaintiff's account, the court concluded there was sufficient evidence to overcome the presumption of prosecutorial immunity. *Barlow v. Ground*, 943 F.2d 1132, 1137 (9<sup>th</sup> Cir. 1991).

**B. Availability of state remedy for malicious prosecution.**

As noted, Defendants contend a claim for malicious prosecution under § 1983 is not available to Plaintiff because "process is available within the state judicial systems to remedy such wrongs." To support their contention, Defendants rely on *Bretz v. Kelman*, 773 F.2d 1026 (9<sup>th</sup> Cir. 1985). Although Plaintiff agrees the *Bretz* court held a claim for malicious prosecution under § 1983 is not generally available if there is an adequate remedy within the state system, Plaintiff argues this case comes within the exception set out in *Bretz* that allows a § 1983 malicious-prosecution claim when "a malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights" and when "the alleged deprivation is inextricable from the alleged corruption of the process which the state ordinarily could provide." *Id.* at 1031.

## 1. Standards.

To prevail on his § 1983 malicious-prosecution claim, Plaintiff "'must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.'" *Lacy v. County of Maricopa*, No. CV-06-2865-PHX-GMS, 2008 WL 5397585, at \*10 (D. Ariz. Dec. 24, 2008)(quoting *Freeman*, 68 F.3d at 1189). Accordingly, "a plaintiff alleging malicious prosecution under section 1983 must . . . establish: (1) the elements of the state law tort; and (2) an intent to deprive the plaintiff of a constitutional right." *Pankey v. City of Concord*, No. C-06-03737 JCS, 2008 WL 793873, at \*7 (N.D. Cal. Mar. 24, 2008)(citing *Madrigal v. Cal.*, No. CV F 06-0595 AWI SMS, 2006 WL 3834284, \*3 (E.D. Cal. Dec. 26, 2006)).

## 2. Analysis.

To establish malicious prosecution under Oregon law, a plaintiff must prove (1) the defendant initiated or procured a judicial proceeding against the plaintiff, (2) the proceeding terminated in the plaintiff's favor, (3) the defendant lacked probable cause to prosecute the action, (4) the defendant acted with malice or with the "primary purpose other than that of securing an adjudication of the claim by the defendant," and (5) damages. *Perry v. Rein*, 215 Or. App. 113, 125 (2007).

Because Plaintiff contends he did not strike Deputy Hathaway, Plaintiff argues his prosecution for Assaulting a Police Officer was with malice and without probable cause. Nonetheless, it is undisputed that Deputy Hathaway told Officer Hager at some point after the scuffle that Plaintiff hit him in the nose with his elbow, and Officer Hager subsequently cited Plaintiff for Assaulting a Police Officer on the basis of Deputy Hathaway's statement. Moreover, there is not any evidence that Deputy Hathaway requested or intended Officer Hager to cite Plaintiff for the crime of Assaulting a Police Officer and there also is not any evidence that Deputy Hathaway took any action to ensure the charge did not go forward.

As one court explained:

Malicious prosecution actions are not limited to suits against prosecutors, but may also be "brought against other persons who have wrongfully caused the charges to be filed." *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9<sup>th</sup> Cir. 2004).

Ordinarily, the decision to file a criminal complaint is presumed to result from an independent determination of the prosecutor, and, thus, precludes liability for those who participated in the investigation or filed a report that resulted in initiation of proceedings. However, the presumption of prosecutorial independence does not bar a subsequent § 1983 claim against state or local officials who improperly exerted pressure on him, knowingly provided misinformation to the prosecutor, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct that was actively instrumental in causing the initiation of legal proceedings.

*Id.* at 1067. . . . While *Awabdy* spoke of bad faith conduct that is instrumental in "causing the initiation" of legal proceedings, *id.*, the principle applies with equal force to one who engages in reckless conduct that is actively instrumental in causing legal proceedings to be improperly maintained even if that conduct played no role in the initiation of the legal proceedings. Should a jury find that [the medical examiner's] statements to [the prosecutor] were incorrect and were made with reckless indifference to the truth, the presumption of prosecutorial independence in maintaining and prosecuting homicide charges will be successfully rebutted.

*Lacy*, 2008 WL 5397585, at \*10. A plaintiff who satisfies this standard also must

present evidence sufficient for a reasonable jury to conclude [the defendant] acted . . . with the intent to deprive [the plaintiff] of a constitutional right. Thus, the relevant inquiry is whether the facts in the record, when viewed in the light most favorable to [the plaintiff], permit the inference that [the defendant] acted with the intent to deprive [the plaintiff] of [his] constitutional rights.

*Id.*

Here, as noted, Deputy Hathaway alleged Plaintiff hit him in the nose when, viewing the evidence in the light most favorable to Plaintiff, he knew that was untrue. Nevertheless, he allowed Plaintiff's prosecution for that incident to proceed through grand jury. A reasonable juror could find Deputy Hathaway knew Plaintiff did not strike him, and, therefore, Deputy Hathaway acted without probable cause or with malice when he allowed the legal proceeding against Plaintiff to go forward. It follows that a reasonable juror also could infer from these

assumed facts that Deputy Hathaway acted with the intent to deprive Plaintiff of his right to liberty under the due-process clause of the United States Constitution. Thus, on this record viewed in Plaintiff's favor, Deputy Hathaway is not entitled to summary judgment on this claim because a genuine issue of material fact exists as to whether Deputy Hathaway acted with malice or without probable cause and with the intent to deprive Plaintiff of his right to liberty under the due-process clause of the United States Constitution.

Accordingly, the Court denies the parties' Motions for Partial Summary Judgment as to that portion of Plaintiff's Third Claim against Deputy Hathaway for malicious prosecution under § 1983.

#### **IV. Malicious prosecution under state law.**

As noted, Plaintiff also intends to state a claim against Multnomah County for malicious prosecution under state law based on the alleged actions of Deputy Hathaway.

Defendants move for summary judgment as to Plaintiff's state-law claim against Multnomah County for malicious prosecution on the grounds that (1) Plaintiff did not incur any economic damages and (2) Plaintiff has not established Deputy Hathaway acted with malice or without probable cause.

As noted, to establish malicious prosecution under Oregon law, a plaintiff must prove (1) the defendant initiated or

procured a judicial proceeding against the plaintiff, (2) the proceeding terminated in the plaintiff's favor, (3) the defendant lacked probable cause to prosecute the action, (4) the defendant acted with malice or with the "primary purpose other than that of securing an adjudication of the claim by the defendant," and (5) damages. *Perry*, 215 Or. App. at 125.

Oregon Revised Statute § 30.650 provides "[n]oneconomic damages, as defined in ORS 31.710, may not be awarded to an inmate in an action against a public body unless the inmate has established that the inmate suffered economic damages, as defined in ORS 31.710." Section 31.710(2)(a) defines economic damages as

objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past and future impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less.

The Court notes Plaintiff alleges in his Complaint that he suffered only noneconomic damages as a result of "malicious prosecution," but Plaintiff asserts in his Response to Defendants' Motion for the first time that he suffered economic damages in the form of a \$5.00 fine imposed by the hearings officer as a sanction for the offenses of assaulting MCDC staff,



failure to follow orders, and disrespectful behavior. Plaintiff also contends § 30.650 violates Article 1, §§ 10 and 17, of the Oregon Constitution and the Equal Protection Clause of the United States Constitution.

**A. Fine.**

Although Plaintiff contends he suffered economic damages when the hearings officer assessed a \$5 fine against him, the Court notes Plaintiff has not established any connection between assessment of the fine by the hearings officer and the state-court action for Assaulting a Police Officer other than the fact that Plaintiff's alleged assault on Deputy Hathaway provided the underlying basis for both actions. Moreover, Plaintiff does not cite any cases to support his position that MCDC's disciplinary proceeding is a "judicial proceeding" for purposes of a malicious prosecution claim. In fact, Plaintiff conceded at oral argument that he has "not seen" malicious prosecution "lie for the acts of a hearings officer." In any event, it is undisputed that the disciplinary procedure did not terminate in Plaintiff's favor.

On this record, the Court concludes as a matter of law that Plaintiff did not suffer any economic damages as a result of the alleged malicious prosecution. Thus, pursuant to Oregon Revised Statute § 30.650 and *Perry*, Plaintiff is not able to establish one of the necessary elements for a malicious-

prosecution claim under state law.

**B. Plaintiff has not established § 30.650 denies him a remedy in violation of Article 1, § 10 of the Oregon Constitution.**

Plaintiff contends even if § 30.650 prohibits him from bringing his state-law malicious-prosecution claim, the Court should not apply that statute because § 30.650 in combination with the OTCA, Oregon Revised Statute § 30.265(1), violates Article I, § 10, of the Oregon Constitution.

Article 1, § 10, of the Oregon Constitution provides in pertinent part that "every man shall have a remedy by due course of law for injury done him in his person, property, or reputation." In *Smothers v. Gresham Transfer, Inc.*, the Oregon Supreme Court analyzed § 10 and concluded:

[T]he remedy clause of Article I, section 10, protects rights respecting person, property, and reputation.

\* \* \*

The word "remedy" refers both to a remedial process for seeking redress for injury and to what is required to restore a right that has been injured. Injury, in turn, is a wrong or harm for which a cause of action existed when the drafters wrote the Oregon Constitution in 1857. A common-law cause of action is a constitutionally adequate remedy for seeking redress for injury to protected rights. However, the remedy clause does not freeze in place common-law causes of action that existed when the drafters wrote the Oregon Constitution in 1857. The legislature may abolish a common-law cause of action, so long as it provides a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects. At a minimum, to be

remedy by due course of law, the statutory remedy must be available for the same wrongs or harms for which the common-law cause of action existed in 1857. That is, if the common law provided a cause of action for an injury to one of the rights that the remedy clause protects, then a legislatively substituted remedial process must be available for that injury.

[I]n analyzing a claim under the remedy clause, the first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury.

332 Or. 83, 124 (2001).

Similarly, in *Voth v. Oregon*, an inmate brought claims for negligence and intentional infliction of emotional distress claims and sought noneconomic damages against the State of Oregon. 190 Or. App. 154, 156-57 (2003). The trial court granted summary judgment to defendant State of Oregon and dismissed the plaintiff's negligence and intentional infliction of emotional distress claims for noneconomic damages on the ground that the plaintiff could not recover noneconomic damages in the absence of establishing economic damages as required by § 30.650. *Id.* at 156. The plaintiff appealed on the ground that § 30.650 deprived him of a remedy in violation of Article I,

§ 10, of the Oregon Constitution. The Oregon Court of Appeals concluded:

[Section 30.650] does not prevent an inmate from having the *capacity* to bring a claim against a public body for negligence or intentional infliction of emotional distress; rather, it imposes a condition on the recovery of noneconomic damages in those kinds of actions. In fact, ORS 30.650 recognizes implicitly the capacity of an inmate to sue for both economic and noneconomic damages. The statute merely operates to bar the *award* of noneconomic damages unless the inmate also establishes that he or she suffered economic damages.

*Id.* at 159-60 (emphasis in original). As to the plaintiff's assertion that Article I, § 10, "guarantees plaintiff a remedy for his noneconomic damages that the legislature could not take away from him," the court explained:

In order for plaintiff to succeed, he must demonstrate that he could have otherwise brought an action for negligence and intentional infliction of emotional distress against the State of Oregon at the time of adoption of the constitution. Under *Smothers*, the first inquiry is whether, at common law, the state was immune from such claims because of the doctrine of sovereign immunity. In *Hale v. Port of Portland*, 308 Or. 508, 512-17 (1989), the court . . . explained that sovereign immunity from legal action "was universally accepted" in the American states, *id.* at 513, 783 P.2d 506; that the Oregon Territory did not modify the common law rule, *id.* at 514, 783 P.2d 506; and that it "was a part of the state's law at the time of statehood." *Id.* Those conclusions make it clear that plaintiff could not have sued the State of Oregon at common law for negligence or intentional infliction of emotional distress because of the doctrine of sovereign immunity. Therefore, Article I, section 10, provides plaintiff with no relief because his action was barred at common law and he would have

had no remedy due to the state's sovereign immunity.

*Id.* at 160-61.

Here Plaintiff does not seek to bring an action against the State, and Multnomah County is not immune from suit under the doctrine of sovereign immunity. Nevertheless, Plaintiff did not cite any authority for his argument that the common law of Oregon recognized a cause of action for malicious prosecution at the time the drafters wrote the Oregon Constitution. Although the Court granted Plaintiff leave at oral argument to file additional authority to support this proposition, Plaintiff did not do so. Thus, the Court concludes on this record that Plaintiff has not alleged "an injury to one of the absolute rights that Article I, section 10 protects," and, therefore, pursuant to *Voth*, § 30.650 does not violate Plaintiff's right to a remedy under Article I, § 10, of the Oregon Constitution. The Court also notes Oregon courts have concluded the OTCA does not violate Article 1, § 10, of the Oregon constitution because the OTCA makes available a substitute remedial process for a plaintiff's injuries. See, e.g., *Jensen v. Whitlow*, 334 Or. 412 420 (2002); *Clarke v. Or. Health Sciences Univ.*, 206 Or. App. 610 (2006). Accordingly, operation of the OTCA alone does not deprive Plaintiff of his rights under Article 1, § 10, of the Oregon Constitution.

In any event, even if Plaintiff had established he suffered an injury within the meaning of the remedy clause of

Article 1, § 10, the Oregon Court of Appeals held in *Voth* that § 30.650 is an adequate substitute remedy to a common-law cause of action because it does not "prevent an inmate from having the capacity to bring a claim against a public body for negligence or intentional infliction of emotional distress; rather, it imposes a condition on the recovery of noneconomic damages in those kinds of actions." *Voth*, at 159-60. This Court is bound by the Oregon Court of appeals analysis in these circumstances. See *Ryman v. Sears, Roebuck and Co.*, 505 F.3d 993, 994 (9<sup>th</sup> Cir. 2007)(when "'there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.'") (quoting *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9<sup>th</sup> Cir. 2001)).

Based on *Smother's*, *Voth*, and *Jensen*, the Court concludes even though §§ 30.265(1) and 30.650 act in combination to restrict the party against whom an inmate can bring his claim and the kind of damages to which the inmate is entitled, these statutes do not prevent an inmate from bringing a claim against a public body. Accordingly, the Court concludes §§ 30.265(1) and 30.650 in combination do not deprive Plaintiff of a remedy in violation of Article 1, § 10, of the Oregon Constitution.

**C. Plaintiff has not established § 30.650 denies him a remedy in violation of Article 1, § 17, of the Oregon Constitution.**

Plaintiff also asserts § 30.650 denies him the right to trial by a jury on his claim for malicious prosecution in violation of Article 1, § 17, of the Oregon Constitution.

In *Voth* the Oregon Court of Appeals evaluated the plaintiff's claims in light of Article I, § 17, of the Oregon Constitution and explained:

Article I, section 17, provides that "[i]n all civil cases the right of Trial by Jury shall remain inviolate." In *Jensen v. Whitlow*, 334 Or. 412, 422 (2002), the court explained:

"Article I, section 17, is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party. Instead, as this court previously has held, Article I, section 17, simply 'guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857[.]' 'The right to pursue a 'civil action,' if it exists, must arise from some source other than Article I, section 17, because, that provision 'is not an independent guarantee of the existence of a cognizable claim.'"

(Brackets in original; citations omitted.) As we hold above, the common law did not provide a jury trial for negligence and intentional infliction of emotional distress actions against the state in 1857.

190 Or. App. at 161.

As noted, Plaintiff has not established that a claim for malicious prosecution was recognized or that a jury trial was

allowed in 1857. Accordingly, the Court concludes Plaintiff has not established § 30.650 denies Plaintiff his constitutional right to trial by jury on his state-law malicious-prosecution claim in violation of Article I, § 17, of the Oregon Constitution.

In summary, Plaintiff has not shown he suffered any economic damages as a result of the alleged malicious prosecution. Plaintiff also has not established § 30.650 violates his rights under Article I, §§ 10 and 17, of the Oregon Constitution. Accordingly, the Court grants Defendants' Motion for Partial Summary Judgment and denies Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Third Claim against Multnomah County for malicious prosecution under state law.

### CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Defendants' Motion (#37) for Partial Summary Judgment as follows:

1. The Court **GRANTS** Defendants' Motion for Partial Summary Judgment as to Plaintiff's First Claim against Sgt. Gorton for excessive force;
2. The Court **GRANTS** Defendants' Motion for Partial Summary Judgment as to that portion of Plaintiff's Second Claim for battery related to acts of Sgt. Gorton;



3. The Court **DENIES** Defendants' Motion for Partial Summary Judgment as to that portion of Plaintiff's Second Claim for assault related to acts of Sgt. Gorton;
4. The Court **DENIES** Defendants' Motion for Partial Summary Judgment as to Plaintiff's Third Claim against Deputy Hathaway for malicious prosecution under § 1983; and
5. The Court **GRANTS** Defendants' Motion for Partial Summary Judgment as to Plaintiff's Third Claim against Multnomah County for malicious prosecution under state law.

The Court also **DENIES** Plaintiff's Cross-Motion (#42) for Partial Summary Judgment in its entirety.

IT IS SO ORDERED.

DATED this 15<sup>th</sup> day of April, 2009.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge